

**IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF WEST VIRGINIA**

Wheeling Division

**DIANA MEY,
DAVID and ROXY VANCE,
RUSSELL LOCKE, and
THOMAS STARK, individually
and on behalf of a class of all
persons and entities similarly situated,**

Plaintiffs,

vs.

Case No. 5:17-cv-00179-JPB

DIRECTV, LLC,

Defendant.

Plaintiffs' Motion for Leave to File Fourth Amended Class Action Complaint

Under Rules 15(a) and 16(b) of the Federal Rules of Civil Procedure, Plaintiffs respectfully move for leave to file the attached proposed Fourth Amended Class Action Complaint. In support, Plaintiffs state:

1. The Court entered a Scheduling Order on January 1, 2021, setting a May 1, 2021, deadline for amending pleadings. (ECF No. 195.) Plaintiffs are filing this motion after that deadline.

2. When a party moves to amend the pleadings after the scheduling order deadline has passed (1) the moving party must satisfy the good cause standard of Rule 16(b), and (2) if satisfied, the movant must then pass the tests for amendment under Rule 15(a). *Littleberry v. Northern Clearing, Inc.*, No. 5:19-cv-177, 2020 WL 4926158, at *1 (N.D.W. Va. Mar. 27, 2020) (Bailey, J.).

3. “Rule 16(b)’s good cause standard focuses on the timeliness of the amendment and the reasons for its tardy submission; the primary consideration is the diligence of the moving party.” *Id.* (citations omitted).

4. “Rule 15 instructs that ‘[t]he court should freely give leave when justice so requires,’ which has been held to disallow an amendment ‘only where it would be prejudicial, there has been bad faith, or the amendment would be futile.’” *Id.* (citations omitted).

5. Plaintiffs satisfy Rule 16(b)’s good cause/diligence standard. Several recent developments warrant the amendment, which will:

- a. Conform and simplify the pleading to reflect the dismissal of several plaintiffs on February 25, 2021 (ECF No. 199), and of several defendants;
- b. Eliminate vicarious liability allegations regarding dismissed defendants, and focus them more narrowly on DirecTV’s vicarious liability for calls made by AC1, the only dealer whose calls are directly involved;
- c. Incorporate information obtained from AC1 in discovery; and
- d. Amend allegations regarding the use of an “automatic telephone dialing system” the definition of which was very recently clarified by the Supreme Court’s April 1, 2021, decision in *Facebook, Inc., v. Duguid*, 141 S.Ct. 1163 (2021). The ATDS issue requires analysis of technical matters regarding the operation of the dialing system used to place the AC1 calls, as well as analysis of the implication of the *Facebook* decision itself.

6. Plaintiffs also satisfy the liberal Rule 15 standard. As a review of the amendment will show, the revisions to the complaint are not futile and do not demonstrate bad faith. And as

discovery has only recently commenced, and ends on June 20, 2022, there is no prejudice to the Defendant by the amendment.

For these reasons, Plaintiffs urge the Court to grant their motion.

Dated: June 2, 2021

Respectfully submitted by,

/s/ John W. Barrett

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd of June 2021, a copy of Plaintiffs' Motion for Leave to File Fourth Amended Complaint was filed using CM/ECF, the Court's electronic notification system, which provided notice to all counsel of record.

/s/ John W. Barrett
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